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BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No 35063

MICHIGAN CENTRAL RY, LLC-  
ACQUISITION AND OPERATION EXEMPTION-  
LINES OF NORFOLK SOUTHERN RY CO.

**PETITION OF BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYEES DIVISION/IBT AND BROTHERHOOD OF RAILROAD SIGNALMEN  
FOR RECONSIDERATION OF PROCEDURAL SCHEDULE**

Pursuant to 49 C.F.R. §1115.3, the Brotherhood of Maintenance of Way Employees Division/IBT ("BMWED") and Brotherhood of Railroad Signalmen ("BRS"), hereby petition the Board for reconsideration of its decision, made July 30, 2007 but served August 2, 2007, adopting the procedural schedule proposed by Michigan Central Railway LLC, WATCO Inc. and Norfolk Southern Ry. ("NSR") with respect to the petition for exemption for Michigan Central's proposed acquisition of rail lines owned and operated by NSR. BMWED and BRS submit that the Board should reconsider its action because the August 2 order involves material error, because the order will be affected by new evidence, and because the order is arbitrary, capricious and inherently unreasonable. The unions submit that the schedule should be revised so that comments are due October 2, 2007, replies are due October 22, 2007, and that a decision will issue by December 1, 2007.

**FACTS**

On Friday July 13, 2007, Michigan Central, WATCO, and NSR filed their various petitions and notices in this Finance Docket and related Finance Dockets. Those filings together

included multiple attachments including several hundred pages of attachments. Among other things, Michigan Central, WATCO, and NSR petitioned for an exemption of the so-called acquisition transaction and requested a procedural schedule under which comments of interested persons would be due 50 days later. Under STB rules, replies to such a petition were due within 20 days of July 13. 49 C.F.R. §1104.12. A few parties responded to the petition within the first two weeks. Other parties filed responses beginning July 30. BRS and BMWED filed their response on August 1, 2007, 19 days after the petition was filed. BMWED and BRS indicated that they were likely to oppose the petition but also argued that more time should be allowed for comments, any replies and for Board consideration of the petition. However, unbeknownst to the unions, on July 30, only 17 days after the petition was filed, the Board decided to adopt the schedule proposed by Michigan Central, WATCO, and NSR. As a result the Board did not consider the timely-filed response of the BMWED and BRS, or the timely filed responses of other persons and entities.

### **ARGUMENT**

\_\_\_\_\_BMWED and BRS respectfully submit that the Board should reconsider its decision adopting the procedural schedule proposed by Michigan Central, WATCO, and NSR because the Board denied interested parties the opportunity to respond to the proposed procedural schedule when they still had several days to submit responses under the Board's own rules. Interested parties had every right to expect that the Board would allow them the time to respond that is provided under 49 C.F.R. §1104.12. This was especially so in this case where interested parties had to first learn of the filings by accessing the Board's website and then download and read hundreds of pages of documents and were in no position to quickly respond to the proposed

schedule when they first had to begin to digest what the filings were about (The unions also note that the petition was filed on a Friday and the Board ruled on a Monday, which substantially reduced the time available for the Board to see position statements of interested parties prior to making its decision). BMWED and BRS submit that it was material error for the Board to rule on the proposed procedural schedule before insuring that interested parties had the full time permitted by its own regulations to comment on the proposed schedule. The unions further submits that the Board's decision was premised on a material error in interpretation of the Act. In adopting the proposed schedule the Board referred to Section 10502(b) and stated that it was adopting the 90 day schedule in compliance with that provision. But Section 10502(b) states that "The Board shall, within 90 days after receipt of any such application, determine whether to begin an appropriate proceeding" (emphasis added). Although the Act plainly requires only that the Board begin a proceeding within 90 days, the Board appears to have construed the Act as requiring a decision within 90 days, this was also material error.

BRS and BMWED further submit that the Board should reconsider its order because of new evidence that should affect the Board's decision. Obviously, the Board ruled without knowing of the position of BMWED and BRS and others regarding the proposed schedule. The unions requested a limited extension of the proposed schedule and also demonstrated that there was no evidence that supported the shorter schedule or that showed potential harm to Michigan Central, WATCO, and NSR if a little extra time was allowed for comments, replies and a decision. By this petition, BMWED and BRS ask the Board to consider this evidence that the Board did not consider when it made its decision.

BRS and BMWED further submit that the order adopting the schedule proposed by

Michigan Central, WATCO, and NSR should be vacated and the Board should reconsider the schedule because the Michigan Central, WATCO, and NSR proposed schedule is plainly unreasonable and prejudicial to other parties, such that the decision adopting that schedule was arbitrary, capricious and inherently unreasonable.

As is explained in the response filed by BMWED and BRS the extension of the proposed schedule is necessary to insure that parties can effectively comment on the planned transactions. It is plainly unreasonable to expect persons who have just come to learn of these transactions to become familiar with them, investigate them and prepare responsive comments a mere 30 days from a Federal Register notice and just 50 days after Michigan Central/NSR/WATCO filings first became public, especially when there clearly are a number of unique aspects about the several proposed transactions. It is especially unreasonable when other parties have only had access to redacted versions of the filings, protective orders issued only recently and counsel will need to execute confidentiality agreements and then review the unredacted filings. The current schedule will severely limit the ability of interested persons and entities to become familiar with the arrangements among Michigan Central, NSR and WATCO, to do their own investigations of the facts and consequences of these plans. The short period for comments virtually forecloses any discovery. And, as BMWED and BRS noted, the comment period adopted by the Board requires that all of the document review, research, investigation and preparation of comments would have to occur when many people (client representatives and counsel) are likely to be away for substantial portions of the month of August. The Board has an obligation to insure that all interested persons and entities have a reasonable opportunity to present their views in a meaningful proceeding; the short schedule currently in place does not provide that opportunity.

Furthermore, there is no apparent reason for extremely fast schedule proposed by Michigan Central/NSR/WATCO, and there is no evidence that they will be harmed by larger periods of time for comments and Board deliberations.

BMWED and BRS also submit that the Board has an obligation to insure that it has enough time to actually consider the views of all interested persons, and to review and digest comments about the transactions so that the Board may make a considered and reasoned decision concerning these transactions

Michigan Central, NSR, and WATCO may say that there is no problem here because they could have effected the acquisition almost immediately by invocation of the class exemption. But they chose to eschew that route and seek an individual exemption. Clearly they made that decision in order to assert some sort of STB imprimatur for the acquisition as an answer to anticipated opposition, and to foreclose subsequent petitions for revocation. They seek to make the individual exemption process the one proceeding addressing their plans. If that is to be the case, the Board has an obligation to provide a meaningful opportunity for comments, not just the appearance of a meaningful proceeding. But by granting the short schedule, and by doing so after foreclosing the ability of interested parties to comment on the proposed schedule within the time allowed in the regulations, the Board has already damaged the credibility of these proceedings.

BRS and BMWED therefore again submit that the schedule for this case should be as follows

comments	60 days after revocation of exemption (October 2, 2007)
replies	20 days after comments due (October 22, 2007)
decision	40 days after replies are due (December 1, 2007)

At a minimum, the time for comments should be extended to and including October 2, 2007.

Respectfully submitted.

/s/  
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Dated: August 1, 2007

## **CERTIFICATE OF SERVICE**

I hereby certify that I have caused to be served one copy of the foregoing Petition of Brotherhood of Maintenance of Way Employees Division/IBT and Brotherhood of Railroad Signalmen for Reconsideration of Procedural Schedule, by first-class mail, postage prepaid, to the offices of the following

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August 3, 2007

/s/ \_\_\_\_\_  
Richard S. Edelman